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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ELVIS RUIZ, FRANCISCO JAVIER
CASTRO and EDUARDO MARTINEZ,

No. CV-11-3088-RMP

PLAINTIFFS' STATEMENT OF
FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT

MAX FERNANDEZ and ANN FERNANDEZ, a marital community; and WESTERN RANGE ASSOCIATION, a foreign nonprofit organization,

Defendants.

PLAINTIFFS' STATEMENT OF FACTS

Plaintiffs offer the following statements of fact in support of their Motion for Partial Summary Judgment against defendants Western Range Association (WRA) and Max Fernandez.

Western Range Association

1. WRA is a membership organization comprised of approximately 200 sheep rancher members. Ex. C, Richins Dep. 34:6–22; Ex. T, WRA By-laws. WRA is owned and controlled by its rancher members. Ex. C, Richins Dep. 17:11–20; Ex. T, WRA By-laws.

2. WRA works with its members to obtain foreign workers to perform sheepherding work under the federal temporary agricultural guestworker program (hereinafter, the “H-2A program”). Ex. C, Richins Dep. 17:11–20; Ex. I, WRA Members Manual.

3. Under the U.S. Department of Labor (“DOL”) regulations governing the H-2A program, WRA is a “joint employer” of the H-2A workers, including the plaintiffs, brought into the United States to perform sheepherding work for WRA’s membership. WRA Answer to Complaint, ¶11 (ECF No. 63).

Testimony and report of Dr. James Holt

4. On October 3, 2000, Dr. James Holt testified on behalf of WRA before the State of California’s Industrial Workforce Commission regarding a proposed elimination of the exemption under California’s minimum wage law for range sheepherders. Ex. A, available at <http://www.dir.ca.gov/iwc/PUBHRG10032000.htm> (hereinafter, “Holt testimony”) at 88.

1 5. Dr. Holt was a senior economist with McGuiness Norris & Williams
 2 in Washington, D.C., general counsel to WRA. Dr. Holt also consulted on the H-
 3 2A program for most of the other H-2A users around the country. At the time of
 4 his testimony, Dr. Holt had been working with WRA for about twelve years and
 5 had gained a good deal of familiarity with sheepherding. Ex. A, Holt testimony at
 6 88.

7 6. WRA executive director Dennis Richins considers Dr. Holt to be an
 8 unsurpassed expert in the sheepherding provisions of the H-2A regulations, and
 9 WRA chose him to testify for this reason. Ex. C, Richins Dep., 180:1–8; 182:16–
 10 25.

11 7. Dr. Holt provided the Commission with a report he had prepared on
 12 behalf of WRA entitled “The Open Range Sheep Industry in California and the
 13 Question of Imposing a State Minimum Wage on Sheepherders” (hereinafter the
 14 “Holt Report,” set forth at Ex. B). Ex. A, Holt testimony at 88; Ex. C, Richins
 15 Dep. 182:3–11.

16 8. Dr. Holt submitted his report to the Commission with the approval of
 17 WRA’s board of directors. Ex. C, Richins Dep. 194:6–21.

18 9. In his testimony, Dr. Holt stated:

1 [The Holt Report] describes the Western Range Association structure
 2 for the use of the H-2A sheepherder program, including the particular
 3 obligations that the Western Range Association has taken on itself as a part
 4 of running the sheepherder program, *such as their status as joint employers,*
where they are essentially guarantors of the contract terms that the
individual members contract for. Ex. A, Holt testimony at 89 (emphasis
 added).

5 10. The Holt Report states:

6 The Western Range Association has voluntarily organized itself as a
 7 ‘joint employer association’ within the meaning of the H-2A regulations.
 8 *This means the Association assumes joint liability with its members for*
compliance with H-2A program requirements and all employment-related
laws and regulations. Ex. B, Holt Report at 8 (emphasis added).

9 11. The following paragraphs 12 through 19 set forth additional aspects of
 10 WRA’s joint employer relationship with its members and workers as described in
 11 the Holt Report.

12 12. “[I]f a member files for bankruptcy and fails to pay the herders, the
 13 WRA would assure that the herders’ wages are paid.” Ex. B, Holt Report at 8.
 14

15 13. “[WRA] suspends and terminates the membership of members who
 16 fail to comply with [WRA] rules or legal requirements.” Ex. B, Holt Report at 8.

17 14. “Since the H-2A program is very difficult for an individual rancher to
 18 use, the threat of suspension or termination by the WRA is an effective means of
 19 securing compliance.” Ex. B, Holt Report at 8.
 20

1 15. “As a joint employer with its members[,] the WRA is also a joint
2 guarantor with its members of the written employment contract entered into with
3 every sheepherder.” Ex. B, Holt Report at 9.

4 16. “Among other things, the contract guarantees the herder full time
5 employment for three years.” Ex. B, Holt Report at 9.

6 17. “If a rancher no longer needs a herder, or a herder is dissatisfied with
7 his employer, the WRA will transfer the herder to another rancher member.” Ex.
8 B, Holt Report at 9.

9 18. “Individual rancher members cannot terminate a herder’s employment
10 with the WRA[;] they can only refer the herder to [WRA] for reassignment.” Ex.
11 B, Holt Report at 9.

13 19. “Involuntary termination of herders by the WRA are [sic] very rare.
14 Herders who are terminated, whether voluntarily or involuntarily, are offered
15 prepaid return transportation to their home country by the WRA.” Ex. B, Holt
16 Report at 9.

17 20. WRA executive director Dennis Richins has indicated that of all of
18 the above statements from the Holt Report are true and apply in full force today.
19 Ex. C, Richins Dep. 194:22–197:14.

WRA assumed employer responsibilities as part of its participation in the H-2A Program

21. In order to employ temporary agricultural workers under the federal H-2A program, prospective employers must apply to the DOL for H-2A labor certification in compliance with DOL rules governing the H-2A program. 20 C.F.R. § 655.100 (1987, amended 2009, 2010).¹

22. In its applications for H-2A labor certification to bring the plaintiffs into the United States as H-2A workers, WRA named itself as the employer and described itself as an association of joint employers. Ex. C, Richins Dep. 115:21–116:16; 136:12–22; Ex. G, WRA-000025.

23. Under DOL rules governing the H-2A program, a prospective H-2A employer must agree, as part of its application for H-2A labor certification, to abide by all conditions of employment required in the rules. 20 C.F.R. § 655.103. In doing so, the employer is required to make a number of specific assurances, among other things, that the employer agrees to comply with all applicable federal, state, and local employment-related laws and regulations, including health and safety laws. 20 C.F.R. § 655.103(b).

¹ As the cited provisions of the H-2A rules are substantially the same in each of the 1987, 2009, and 2010 versions of the rules, all such provisions are hereinafter cited to the 1987 rules.

1 24. In its applications for H-2A certification, WRA certified under penalty
2 of perjury, by signature of WRA executive director Dennis Richins, as to the
3 employer's assurances regarding compliance with a number of specified conditions
4 of employment required by the H-2A rules. Ex. G, WRA-000030, 000032.

5 25. In its applications for H-2A certification, WRA agreed, among other
6 things, that during the applicable period of employment, the employer will comply
7 with all applicable federal, state, and local employment-related laws and
8 regulations, including employment-related health and safety laws. Ex. G, WRA-
9 000031.

10 26. In its applications for H-2A certification, WRA also agreed that the
11 wage rate offered to prospective H-2A workers is the highest of the adverse effect
12 wage rate, the prevailing wage rate, or the federal or state minimum wage as
13 applicable, and that the employer will pay the offered wage during the entire
14 period of the approved labor certification. Ex. G, WRA-000030.

15 27. Following DOL approval of its applications for H-2A certification,
16 WRA petitioned the U.S. Department of Homeland Security ("DHS") for the
17 issuance of H-2A visas that allow its recruited workers admission into the United
18 States. Ex. C, Richins Dep. 157:15–158:20; Ex. H, WRA-000014–000016.

28. In petitioning the DHS for H-2A visas for sheepherders, WRA identifies itself as the employer. Ex. C, Richins Dep. 159:2–9; Ex. H, WRA-000014. Only an employer of a prospective H-2A worker may petition DHS to issue H-2A visa, and WRA is allowed to do so as a joint employer. Ex. C, Richins Dep. 159:10–15.

29. When a WRA member “orders” an H-2A sheepherder from WRA, the member must sign a sheepherder “Application Agreement” that “defines the conditions of employment for [the] sheepherder.” Ex. I, WRA Members Manual, WRA-000310; Ex. C, Richins Dep. 139:16–140:20.

30. WRA's sheepherder application agreement requires the member to certify its need for an H-2A sheepherder, agree to pay WRA specified sums to engage in efforts to obtain the requested herder, and agree to a detailed list of terms and conditions of employment to which the member must adhere. The required terms and conditions include provisions as to the period of employment; wages, insurance and other benefits; that the employment be full-time and year round work; and that the member is familiar with, among other things, the DOL's H-2A rules and regulations and agrees to abide by them. Ex. D (Richins Dep. Ex. 9) at p. 2 of 4.

WRA recruited and hired plaintiffs in Chile, and brought them to the United States as H-2A workers

1 31. For over the past several years, WRA has retained “recruitment
 2 coordinators” in Chile and Peru to recruit potential H-2A sheepherders in those
 3 countries. Ex. F, Peters Dep. 43:14–44:9; Ex. C, Richins Dep. 100:13–17.

4 32. The recruitment coordinators work for WRA; they do not work for
 5 and have no connection with WRA’s members. Ex. C, Richins Dep. 138:15–20;
 6 138:25–139:9.

7 33. WRA’s recruitment coordinator in Chile, Victor Toscanini, recruited
 8 plaintiffs to work as WRA sheepherders. Ex. C, Richins Dep. 100:13–101:15.

9 34. WRA pays its recruitment coordinators on a commission basis, paying
 10 \$125 for each sheepherder recruited to WRA; in 2008, WRA paid its recruitment
 11 coordinators in Chile and Peru a total of \$60,279. Ex. C, Richins Dep. 101:3–9;
 12 Ex. F, Peters Dep. 48:22–49:24.

13 35. Before a recruited worker travels to the United States, WRA’s
 14 recruitment coordinator provides the worker with a Pre-Employment Notice of
 15 Rights and Obligations (“pre-employment notice”). Ex. C, Richins Dep. 110:10–
 16 111:24; 144:6–8; Ex. E, (Richins Dep. Ex. 10).

17 36. The pre-employment notice, printed in both English and Spanish, is a
 18 standard form prepared by WRA. Ex. C, Richins Dep. 110:25–111:6. WRA
 19 requires the notice to be signed by a recruited worker before arrangements are

1 made for the worker's departure from his home country. Ex. C, Richins Dep.

2 144:9–145:2; Ex. E (Richins Dep. Ex. 10).

3 37. In the pre-employment notice, WRA describes, among other things,
 4 the nature of the work to be performed by the recruited worker; the minimum wage
 5 rate to be paid; transportation arrangements to and from the worker's home
 6 country; and the provision of tools, housing, food, and insurance benefits. Ex. E,
 7 (Richins Dep. Ex. 10)

8 38. The pre-employment notice agreement informs the worker that all H-
 9 2A sheepherders are subject to transfer; instructs the worker to contact WRA if a
 10 member no longer has need of the worker, in which case the worker will be
 11 transferred to another job assignment; and advises the worker to contact WRA
 12 immediately if the worker is "having any problems" or becomes "unemployed."
 13 Ex. E (Richins Dep. Ex. 10).

14 39. WRA arranged for transportation of the plaintiffs from Chile to their
 15 U.S. worksites, including Fernandez Ranch. Ex. J, WRA-000068–000073 (Elvis
 16 Ruiz); Ex. K, WRA-000145–000163 (Francisco Castro); Ex. L, WRA-000266–
 17 000280 (Eduardo Martinez).

18 40. WRA pays the costs of its sheepherders' inbound transportation to the
 19 United States, as well as the cost of transportation from one WRA member
 20 worksite to another if the herder is transferred. Ex. B, Holt Report at 12.

1 41. WRA provides return transportation to the home country for all
2 herders when their employment terms are completed. Ex. B, Holt Report at 12.
3

4 **WRA controls the nature and structure of the employment relationship.**

5 42. Upon a sheepherder's arrival at his U.S. worksite, WRA requires the
6 herder and the WRA member to whom he is assigned to enter into a "Sheepherder
7 Employment Agreement." Ex. C, Richins Dep. 167:5–13; Ex. M, (Richins Dep.
8 Ex. 14), WRA-000012 (Elvis Ruiz); Ex. N, WRA-000095–000098 (Francisco
9 Castro); Ex. O, WRA-000179–000182 (Eduardo Martinez).

10 43. WRA provides members and workers with its standard form of
11 employment agreement containing terms and conditions required by WRA. Ex. C,
12 Richins Dep. 166:10–16. WRA does not permit any changes to be made to the
13 terms and conditions set forth in the agreement. Ex. C, Richins Dep. 166:4–16;
14 176:7–14.

15 44. Under WRA's sheepherder employment agreement, the nominal
16 parties are the sheepherder and the WRA member to whom he is assigned, but the
17 named member is specifically identified as "a member of the Western Range
18 Association." Ex. M, (Richins Dep. Ex. 14), WRA-000012; Ex. N, WRA-000097;
19 Ex. O, WRA-000181.

1 45. Under the sheepherder employment agreement, WRA determines
 2 where the sheepherder will initially work: “[T]he Employee hereby accepts
 3 employment as a sheepherder with the Employer *or any other Employer who is a*
 4 *member of the Association who may be selected by the Association at the*
 5 *Association’s option.*” Ex. M, (Richins Dep. Ex. 14), WRA-000012, page 1 of 2
 6 (emphasis added); Ex. C, Richins Dep. 167:14–168:5.

7 46. The agreement contains terms and conditions of employment,
 8 including terms and conditions needed to comply with DOL requirements. Ex C,
 9 Richins Dep. 170:2–6. Ex. M, (Richins Dep. Ex. 14), WRA-000012.

10 47. The agreement also contains a provision generally requiring the WRA
 11 member to “comply with all applicable laws of the United States and the individual
 12 states.” Ex. M, (Richins Dep. Ex. 14), WRA-000012, page 1 of 2.

13 48. Although not explicitly referenced in the agreement, the H-2A rules
 14 provide that all terms and conditions required under the rules are incorporated in
 15 the job offers and work contracts provided to H-2A workers. 20 C.F.R. §
 16 655.102(b) (every H-2A job offer shall include the minimum wage, benefits, and
 17 working condition provisions required under the regulations); 20 C.F.R. § 655.103
 18 (job offers must include agreement to abide by conditions set forth in H-2A labor
 19 certification rules); 29 C.F.R. § 501.10 (for DOL enforcement purposes, H-2A

1 “work contract” defined as including all material terms and conditions of
 2 employment required under H-2A labor certification rules).

3 49. In anticipation of potential claims against WRA by sheepherders, the
 4 agreement provides that the WRA member “agrees to defend, indemnify, and hold
 5 the Association harmless from any claim, demand, or lawsuit arising out of or
 6 related to the employment of the Employee, including but not limited to any claim
 7 by the Employee for wages or damages of any kind.” Ex. M, (Richins Dep. Ex.
 8 14), WRA-000012, page 2 of 2.

9 50. WRA maintains employment files, called “herder files,” for all of its
 10 sheepherders; the files contain documentation of their employment contracts, labor
 11 certifications, travel information, and transfer records. Ex. F, Peters Dep. 36:24–
 12 37:25. In addition, any records made by WRA personnel as to a complaint by or
 13 about a herder would be kept in the herder’s file. Ex. C, Richins Dep. 91:23–92:4;
 14 234:12–235:19.

15
 16 **WRA controls the wages and benefits offered to its sheepherders**

17 51. WRA will not allow members to negotiate wage rates lower than rates
 18 required under H-2A rules. Ex. C, Richins Dep. 176:7–177:5.

19 52. WRA requires its members to provide worker’s compensation
 20 insurance coverage to workers assigned to them, as required under the H-2A rules.
 21

Ex. C, Richins Dep. 41:11–23; Ex. M, (Richins Dep. Ex. 14), WRA-000012; 20 C.F.R. § 655.102(b)(2).

53. WRA provides health and life insurance to WRA herders pursuant to a group insurance plan. Ex. C, Richins Dep. 40:13–18; Ex. P, WRA-000436 to 000442. WRA’s sheepherder employment agreement requires the herders to pay for one half of the monthly premium for insurance coverage. Ex. M, (Richins Dep. Ex. 14), WRA-000012.

54. WRA would not be able to provide this group insurance plan to its
herders were it not their joint employer. Ex. C, Richins Dep. 40:13–41:10.

55. WRA's group insurance plan for its herders also covers WRA's office employees, though with a different schedule of benefits than the one applicable to herders. Ex. P, WRA-000442.

WRA controls workers' job assignments and has the power to transfer workers from among assignments

56. The sheepherder employment agreement provides that WRA may “transfer [the herder] to another Employer, who is a member of the Association, provided that the new Employer agrees to be bound by all terms and conditions of this Agreement.” Ex. M, (Richins Dep. Ex. 14), WRA-000012.

57. Under the sheepherder employment agreement, if a herder objects to a transfer, “the Association will consider the worker’s concerns,” but a worker who

1 refuses a transfer “may be subject to dismissal.” Ex. M, (Richins Dep. Ex. 14),
 2 WRA-000012, page 2 of 2.

3 58. WRA members may not transfer herders among themselves without
 4 obtaining WRA’s involvement and consent; otherwise, WRA would lose control
 5 over worker assignments. Ex. C, Richins Dep. 210:25–212:5.

6 59. WRA has employed transfer coordinators who are responsible for
 7 arranging transfers of herders when the need arises. Ex. F, Peters Dep. 19:23–
 8 20:10.

9 60. WRA continuously maintains a listing of available herders for
 10 transfer. Ex. I, WRA Members Manual, WRA-000320.

11 61. WRA transferred both plaintiffs Castro and Martinez from one WRA
 12 member to another at various times during their H-2A employment. Ex. Q, WRA-
 13 000147–000154 (regarding transfers of Francisco Castro); Ex. R, WRA-000270–
 14 000272 (transfer of Eduardo Martinez).

15 62. At various times since 2005, five sheepherders left employment with
 16 Max Fernandez after WRA transferred them to other members. Ex. S, Max
 17 Fernandez Response to Interrogatory No. 2 of Plaintiffs’ First Set of
 18 Interrogatories.

19 63. WRA’s pre-employment notice instructs sheepherders about the
 20 possibility of transfer and to contact WRA when they need to be transferred: “All
 21

1 H-2A sheepherders are subject to transfer. If a member no longer needs your
2 services, you will contact Western Range Association's office and at the next
3 available transfer you will be moved to a new employer." Ex. E, (Richins Dep. Ex.
4 10).

5 64. WRA's ability to transfer sheepherders from members who do not
6 have work for them allows WRA to ensure compliance with the three quarters
7 work guarantee required under the H-2A rules. Ex. C, Richins Dep. 149:17–
8 150:15.

9 65. WRA has also encouraged its members to make use of transfers to
10 resolve work placement problems: "If you have any problems with a herder please
11 call Western Range Association immediately. Sometimes we can solve the
12 problem with communications or, if necessary, a transfer of the herder. We will
13 make every attempt to find a solution for your labor problems." Ex. I, WRA
14 Members Manual, WRA-000320.

15 66. If a WRA member no longer needs a herder or if the herder becomes
16 dissatisfied with the member, WRA will transfer the herder to another member.
17 Ex. B, Holt Report at 9; Ex. C, Richins Dep. 45:10–20; 46:19–47:1; 196:16–20.

18 67. WRA's ability to transfer herders extends to situations in which
19 member is found to have mistreated a herder and in which a member has violated
20
21

1 wage payment or other terms of employment required by the DOL. Ex. C, Richins
 2 Dep. 42:23–43:12; 44:1–45:4.

3 68. If a herder requests reassignment to another member “because of
 4 alleged mistreatment or for other reasons” WRA will accommodate the request
 5 provided the herder is adequately performing his duties. Ex. B, Holt Report at 13.

6

7 **WRA has the power to terminate workers.**

8 69. WRA’s sheepherder employment agreement allows WRA to
 9 terminate the employment of a worker who commits a willful breach of contract.
 10 Ex. M, (Richins Dep. Ex. 14), WRA-000012.

11 70. Under the sheepherder employment agreement, WRA must be made a
 12 party to any termination by mutual agreement of the parties. Ex. M, WRA-
 13 000012; Ex. C, Richins Dep. 171:9–15.

14 71. Individual WRA members cannot terminate a herder’s employment,
 15 and can only refer the herder to WRA for reassignment. Ex. B, Holt Report at 9;
 16 Ex. C, Richins Dep. 196:20–197:3.

17

18 **WRA has the power to terminate members who violate herder
 19 employment conditions or terms or otherwise mistreat workers.**

20 72. WRA’s By-laws empower WRA’s Board of Directors to suspend,
 21 terminate, or expel members for cause, including for conduct in violation of the

1 By-laws or of any other rules and regulations of the Association. Ex. T, WRA-
2 000388 –000389; Ex. B, Holt Report at 8; Ex. C, Richins Dep. 195:14–196:1.

3 73. For purposes of the membership termination provisions of WRA's
4 By-laws, rules and regulations of the Association include DOL rules and
5 regulations. Ex. C, Richins Dep. 29:2–12.

6 74. Any WRA member caught mistreating a WRA sheepherder is subject
7 to termination of WRA membership. Ex. C, Richins Dep. 68:21–69:21; 79:5–
8 80:1.

9 75. WRA does not permit its members to employ H-2A sheepherders to
10 perform non-sheepherding work, also known as “work outside of the job
11 description,” because that is in violation of DOL rules and would be grounds for
12 termination of membership. Ex. C, Richins Dep. 190:18–191:10.

13 76. WRA considers a member's use of an H-2A contracted worker
14 outside of the job description to be a direct violation of an agreement between
15 WRA and the DOL. Ex. I, WRA Members Manual, WRA-000321.

16

17 **Plaintiffs' Work at the Fernandez Ranch**

18 77. Plaintiffs worked for Max and Ann Fernandez pursuant to the H-2A
19 program. Fernandez Answer, ¶1. (ECF No. 65)

1 78. Defendant Max Fernandez operates Fernandez Ranch. Fernandez
 2 Answer, ¶ 4. (ECF No. 65)

3 79. Defendants filed H-2A visa applications as joint employers each year
 4 from 2007 to 2010 for sheepherders. Fernandez Answer, ¶ 4. (ECF No. 65)

5 80. Defendant Max Fernandez entered into employment contracts with
 6 each of the plaintiffs. Fernandez Answer, ¶ 10. (ECF No. 65)

7 81. Max Fernandez did not pay plaintiffs at either the federal minimum
 8 wage or the non-sheepherder adverse effect wage rate (“AEWR”) for the non-
 9 sheepherding work that they performed at Fernandez Ranch. Fernandez Answer, ¶

10 11. (ECF No. 65)

11 82. The sheep at Fernandez Ranch are kept fenced at the headquarter
 12 ranch every year from some time in December until after lambing is finished in
 13 April. Ex. U, Fernandez Dep. 34:8–17.

14 83. Plaintiff Eduardo Martinez arrived at Fernandez Ranch on January 5,
 15 2010. Ex. Y, WRA 000177.

16 84. Eduardo Martinez worked in January and February 2010 at the
 17 headquarters ranch feeding the sheep, cows and horses twice per day. This
 18 involved loading hay bales onto pickup trucks, driving to wherever the animals
 19 were being kept, and then unloading the hay for the animals. Ex. Z, Martinez Dep.
 20 17:1-21.

1 85. Mr. Martinez also worked in January and February 2010, cleaning up
 2 at the ranch and performing truck and machine maintenance. Ex. Z, Martinez Dep.
 3 17:1–22:21; Ex. AA, Maintenance Records; Decl. Martinez ¶¶ 2–3.

4 86. In early March 2010, Mr. Martinez continued feeding the animals,
 5 checked fences, cleaned the yard and patio, and cut firewood. Ex. Z, Martinez
 6 Dep. 22:22–23:1–3.

7 87. In the remainder of March and part of April 1010, Mr. Martinez
 8 worked a shift from 6:00 am to 8:00 pm helping with the lambing at the
 9 headquarters ranch, as well as doing clean-up. Ex. Z, Martinez Dep. 23:13–24:6.

10 88. After lambing was finished, Mr. Martinez prepared the sheep to be
 11 taken to pasture, cleaned at the ranch, fed the dogs and the cows, and checked on
 12 the horses, after which he helped with calving. Ex. Z, Martinez Dep. 24:7–25:14.

13 89. In May 2010, Mr. Martinez worked one week taking the sheep to
 14 pasture each day, leaving at 6:00 in the morning and returning the sheep to the
 15 corral at the headquarters ranch at 6:00 in the evening. At night he stayed in the
 16 ranch housing. Ex. Z, Martinez Dep. 25:20–26:10; Decl. Martinez ¶ 9.

17 90. A week later, when a new sheepherder arrived at the ranch, that
 18 sheepherder took the sheep out to pasture, and Mr. Martinez worked at the ranch
 19 cleaning corrals, checking the pickup trucks, making firewood and constructing a

1 corral for cattle, until he left the ranch on May 20, 2010. Ex. Z, Martinez Dep.

2 26:11–28:11.

3 91. During Eduardo Martinez' entire employment at Fernandez Ranch,
 4 from January 5, 2010 until he left on May 20, 2010, he lived on the main
 5 headquarters ranch and worked under the constant supervision of Max Fernandez.
 6 Decl. Martinez ¶¶ 8–9.

7 92. Elvis Ruiz worked at Fernandez Ranch from August 2007 until
 8 January 3, 2010. Decl. Ruiz ¶ 1. For the first four days at the ranch, he helped the
 9 other sheepherder maintaining machinery, repairing fence posts and other ranch
 10 chores. After that he took the sheep to graze on rented property near the ranch for
 11 about one month. Decl. Ruiz ¶¶ 1–2.

12 93. In October 2007, Mr. Ruiz spent about fifteen days grazing the sheep
 13 on the headquarters ranch, until the lambs were sold. After that he worked for the
 14 next several months doing a variety of ranch chores, such as: preparing the land to
 15 plant, repairing machinery, changing the oil in tractors, and repairing fences. He
 16 would leave the sheep to graze on the ranch in the morning, do his other ranch
 17 work, and then bring the sheep back to the corral at night. He would also cut
 18 firewood during this time. Decl. Ruiz ¶¶ 3–4.

19 94. During the entire time that Elvis Ruiz worked on the ranch, Max
 20 Fernandez would supervise him directly or call him on the telephone regularly

1 during the day to give him instructions as to what tasks to do next and check up on
 2 him. Decl. Ruiz ¶ 16.

3 95. Starting with the first snows in December 2007 and through February
 4 2008, the sheep would stay in a corral on the main ranch. Elvis Ruiz would feed
 5 the animals twice per day, which took 2.5 hours each feeding, plus take firewood
 6 to the house. Decl. Ruiz ¶ 4.

7 96. During the lambing season of March and April 2008, Elvis Ruiz
 8 worked the night shift. Decl. Ruiz ¶ 5.

9 97. From late April to September 2008, Mr. Ruiz took the sheep to graze
 10 at various properties off the ranch, except for one week in July in which he worked
 11 and slept at the ranch between grazing locations. Mr. Ruiz stayed at the ranch
 12 from October to December 2008. In October he would take the sheep to nearby
 13 properties to graze during the day three days per week. During the other days, Mr.
 14 Fernandez had Mr. Ruiz doing ranch chores. In November 2008, Mr. Ruiz also
 15 vaccinated the cows. Once again, from December 2008 to February 2009, he
 16 worked regular hours each day feeding the sheep, cows, and horses, and doing
 17 chores around the ranch. He would also run errands into Goldendale for Mr.
 18 Fernandez, as well as repair and maintain machinery. Decl. Ruiz ¶¶ 6–9.

19 98. In March and early April 2009, Mr. Ruiz worked a regular shift
 20 lambing at headquarters. Francisco Castro worked the other shift. Decl. Ruiz ¶ 9.

1 99. From the time that Francisco Castro took the sheep out away from the
 2 ranch in late April 2009, until he returned to the ranch five months later in
 3 September 2009, Elvis Ruiz had no responsibilities for the sheep at all. Mr. Ruiz
 4 cut the hay for harvest, prepared the tractor at the end of each day for the next
 5 day's work, repaired fences, cared for the cows and horses, and prepared
 6 machinery for storage. Decl. Ruiz ¶¶ 10–12, ¶15 (c) & (f). In late September
 7 2009, Mr. Ruiz and Mr. Castro built a corral for the cows. Decl. Ruiz ¶ 15. In
 8 November 2009, Mr. Ruiz worked in crop land. Decl. Ruiz ¶15 (a) & (b).

9 100. Elvis Ruiz did not work as a range sheepherder at all in 2009. Decl.
 10 Ruiz ¶¶ 2–7.

11 101. Francisco Castro arrived at the Fernandez Ranch in March 2008.
 12 Decl. Castro ¶ 1. He did not take the sheep off the ranch at all until late April or
 13 May of 2009. Decl. Castro ¶¶ 2–7.

14 102. From March 2008 until he asked to be transferred from Fernandez
 15 Ranch in October 2008, Mr. Castro worked on the headquarters ranch under Mr.
 16 Fernandez' direct supervision, performing a variety of ranch tasks and sleeping at
 17 the ranch housing. During this time he built a fence on the property across the
 18 road from the main ranch and helped construct a large hay storage structure. Decl.
 19 Castro ¶¶ 2–4, ¶11 (e), (f), (g), (h) & (k); Ex. V (Fernandez Dep. Exhibit 9).

1 103. From April 2008, when Elvis Ruiz started taking the sheep off of the
2 ranch to graze, until late September 2008 when Mr. Ruiz returned, Mr. Castro had
3 no responsibilities caring for the sheep. Decl. Castro ¶ 2.

4 104. From the time of Mr. Castro's return to the Fernandez Ranch in
5 March 2009 until he left the ranch for good on March 30, 2010, he spent a total of
6 five months watching the sheep off the ranch. During part of that time, Mr.
7 Fernandez instructed him to leave the sheep in temporary fencing during the day
8 on the pasture and to return to the ranch to perform ranch work. Decl. Castro ¶¶ 6–
9 7, 12–13.

10 105. Aside from that one five-month period, Mr. Castro worked the entire
11 time under Mr. Fernandez' direct supervision on the ranch, sleeping in the ranch
12 housing. Decl. Castro ¶¶12–14.

13 106. After Mr. Castro returned to the ranch with the sheep in September
14 2009, he stayed on the ranch performing general ranch chores for the remainder of
15 his employment with Fernandez Ranch including cleaning, repairing fences,
16 building a garage, maintaining equipment, plowing, moving boulders from fields,
17 feeding animals in the corrals, tagging new calves, and helping turn wood into
18 lumber. Decl. Castro ¶¶ 8, 11(b), (c), (d), (i), & (j).

19 107. Only one sheepherder at a time took the sheep to graze. Decl. Castro ¶
20 13; Ex. U, Fernandez Dep. 17:3–10; 74:4–23; 78:4–12.

1 108. During plaintiffs' employment, Max Fernandez had a total of
2 somewhere between 300-500 adult sheep. Ex. U, Fernandez Dep. 60:9-21; 61:4-8.

3 109. Max Fernandez sold his lambs and calves to a buyer in Oregon in
4 2008-2010. Ex. U Fernandez Dep. 47:24-48:20; 50:19-51:1; Ex. W, (Fernandez
5 Dep. Ex. 4).

6 110. Max Fernandez kept watch on the sheepherders through binoculars on
7 a daily basis even when they were herding the sheep off of the ranch. Ex. U,
8 Fernandez Dep. 18:4-20; 78:13-24.

9 111. The attached map shows all of the locations at which the plaintiffs
10 would have grazed sheep or performed other work associated with Fernandez
11 Ranch. Ex. X, (Fernandez Dep. Ex. 1)

12 a. Properties 10 and 11 constitute the main headquarters ranch where
13 Fernandez' home, office, lambing barn, hay structure, and herder
14 ranch housing are located. Mr. Fernandez also grows grass, wheat
15 and alfalfa there. Ex. U, Fernandez Dep. 30:2-20.

16 b. Properties 1 and 2 are uncultivated, fenced land leased by Mr.
17 Fernandez from the government for grazing his sheep. These
18 properties are approximately five miles from the main ranch. Ex.
19 U, Fernandez Dep. 10:18-11:24; 14:6-21.

c. Property 3 is a fenced, uncultivated property owned by Mr. Fernandez that he uses for grazing sheep. It sits on the Centerville Highway approximately five miles from the main ranch. Ex. U, Fernandez Dep. 15:20–16:21.

d. Property 4 is an uncultivated parcel of land across the street from Property 3 that Mr. Fernandez leases to graze sheep. Ex. U, Fernandez Dep. 18:24–19:25.

e. Properties 5 and 6 are parcels owned by Mr. Fernandez where the cattle graze year round. Ex. U, Fernandez Dep. 20:15–25.

f. Property 7 is land owned by Mr. Fernandez on which he alternately grows wheat and uses for grazing. When the sheep graze here, the herders stay at night at the main ranch in their regular housing. Ex. U, Fernandez Dep. 23:2-10; 24:7-18.

g. Property 8 is rented land that is fenced, and that Fernandez Ranch uses to grow hay and to graze. Ex. U, Fernandez Dep. 24:21-25:

h. Property 9 is owned by Max Fernandez. He uses this fenced land across from the ranch headquarters to grow grass and alfalfa and to graze sheep. Ex. U, Fernandez Dep. 28:13-22; 29:6-13.

- 1 i. Property 12 is considered part of the main ranch. It is planted in
- 2 grass and alfalfa and used for grazing for sheep and cattle. Ex. U,
- 3 Fernandez Dep. 34:18–35:10.
- 4 j. Property 13 is a neighbor's property that Mr. Fernandez would use
- 5 to graze the sheep. Ex. U, Fernandez Dep. 37:24–38:11.
- 6 k. Each square on the map is approximately one mile long. Ex. X,
- 7 (Fernandez Dep. Ex. 1).
 - 8 l. Plaintiff Ruiz grazed sheep in 2008 for a time on the property
 - 9 identified in Exhibit No.2 as near the John Day Dam by the
 - 10 Columbia River. Ex. U, Fernandez Dep. 35:24–36:11.

11 112. During plaintiffs' employment at Fernandez Ranch, Mr. Fernandez
12 employed two or even three sheepherders at a time. Ex. S, Max Fernandez
13 Response to Interrogatory No. 2 of Plaintiffs' First Set of Interrogatories.

14 113. Lambing is done in the large barn on the main ranch, close to the
15 home of Max Fernandez, as shown in the attached photograph. Ex. U, Fernandez
16 Dep. 32:11–13; Ex. BB (Fernandez Dep. Ex. 3).

17 114. According to Max Fernandez, the only work that Elvis Ruiz did for
18 the five months that Francisco Castro was caring for the sheep off the ranch, was
19 take food to Mr. Castro, feed the horses and dogs, and remove grass from the dogs'
20 feet. Ex. U, Fernandez Dep. 74:4–13; 78:4–12.

1 115. The DOL has established a set of “special procedures” for employers
 2 of H-2A range sheepherders that exempt those employers from minimum hourly
 3 wage and recordkeeping requirements. *See* Ex. CC, DOL Field Memorandum No.
 4 24-01 (issued August 1, 2001) and attached Special Procedures: Labor
 5 Certification for Sheepherders Under the H-2A Program.

6 116. The DOL’s sheepherder special procedures apply only to H-2A
 7 employers’ requests for FLSA-exempt sheepherders. Ex. CC, DOL Field
 8 Memorandum No. 24-01 at pp.3. Pursuant to the Special Procedures, qualifying
 9 H-2A employers may pay range sheepherders a flat monthly wage, regardless of
 10 the number of hours worked. Ex. CC, US DOL Special Procedures, pp. 3.

11 117. The DOL’s rationale for the special procedures is the “unique
 12 characteristics of sheepherding,” which requires workers to spend extended periods
 13 of time grazing herds of sheep in isolated mountainous terrain, and to be on call 24
 14 hours a day, 7 days a week. Ex. CC, Field Memorandum at p. 1 ¶ 3.

15 118. The Special Procedures are intended for workers whose duties fit
 16 within the Dictionary of Occupational Titles (“DOT”) description for Ex. DD,
 17 “sheepherder” (DOT 410.687.022).

18 119. The Special Procedures do not apply to those workers whose duties
 19 would be classified as Ex. EE, “Farmworker, Livestock.” (DOT 410.664.010) and
 20 Ex. CC, US DOL Special procedures at Part 1.

1 120. Under the DOL's sheepherder special procedures, employers may
2 supplement the sheepherder job description by including information such as the
3 size of flocks of sheep, which may be up to 1,000 head of sheep. Ex. CC, US DOL
4 Special Procedures, pp. 1-2.

5 121. In the Holt Report, Dr. James Holt indicated that a typical flock (or
6 "band") of sheep numbers approximately 1,000 ewes, together with their lambs,
7 and that a single sheepherder typically works with one such band of sheep. Ex. B,
8 Holt Report at 6-7; Ex. C, Richins Dep. 188:18-189:15.

9 122. WRA executive director Dennis Richins considers it economically
10 infeasible to employ more than one sheepherder to care for a band of only 500
11 sheep. Ex. C, Richins Dep. 188:3-18.

12 123. WRA requires ranchers to have at least 500 sheep in order to become
13 a member of WRA. Ex. C, Richins Dep. 17:5-10; 23:24-24:9.

14

15 RESPECTFULLY SUBMITTED this 12th day of December, 2012

16 NORTHWEST JUSTICE PROJECT

17

18 /s/ Michele Besso
Michele Besso, WSBA #17423

19

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21 PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT
OF PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT PAGE - 29

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1 FARMWORKER JUSTICE

2 /s/ Weeun Wang

3 Weeun Wang

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PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT
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SUMMARY JUDGMENT PAGE - 30

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2012, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system and caused it to be served by mail to the following:

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DATED this 12th day of December, 2012.

By: /s/ Alex Galarza

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